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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers	)))	CC Docket No. 97-146

JOINT COMMENTS OF
E.SPIRE COMMUNICATIONS, INC.,
KMC TELECOM, INC., TALK.COM HOLDING CORP.,
AND XO COMMUNICATIONS, INC.

Brad E. Mutschelknaus
Ross A. Buntrock
KELLEY DRYE & WARREN LLP
1200-19th Street N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

Dated: January 11, 2001

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I. INTRODUCTION AND SUMMARY

e.spire Communications, Inc., KMC Telecom, Inc., Talk.com Holding Corp., and XO Communications, Inc. (collectively the "Joint Commenters"), by their attorneys, hereby submit the following Comments in response to the Commission's Notice in the proceeding captioned above.[1] In its Notice, the Commission sought comment on whether and how to reform the manner in which competitive local exchange carriers ("CLECs") may tariff the charges for the switched exchange access service that they provide to interexchange carriers ("IXCs"). As leading providers of telecommunications services in markets across the nation, the Joint Commenters have a direct and vital interest in the outcome of this proceeding.

In these Comments, the Joint Commenters attempt to address the Commission's request for further information on how to create a benchmark for CLEC access charges and support the Guaranteed Reduced Exchange Access Tariffs ("GREAT") Proposal described in the

[1] "Common Carrier Bureau Seeks Additional Comment on Issues relating to CLEC Access Charge Reform," DA 00-2751 (rel. Dec. 7, 2000) ("Notice").

comments being submitted today by the Association for Local Telecommunications Services ("ALTS"). As discussed below, Joint Commenters recommend that the Commission adopt the GREAT Proposal and establish a "benchmark" rate approach to assure the reasonableness of CLEC access charges, while at the same time concluding that carriers whose rates are set at the benchmarks not be subject to mandatory detariffing. In addition, the Joint Commenters submit that the Commission should explicitly affirm that IXCs are prohibited by the Communications Act from using self-help to resolve rate disputes.

II. ESTABLISHING A TARIFFED "BENCHMARK RATE" WILL ENSURE THE CONTINUING REASONABLENESS OF RATES AND OBVIATE THE NEED FOR ADDITIONAL LITIGATION

In its Notice, the Commission implicitly recognized that, contrary to the position taken by ILECs in this proceeding, there is not a "one size fits all" rate that every carrier should mirror. Rather, the Commission has acknowledged that carriers operating in rural or high-cost areas should be subject to a benchmark that recognizes the realities of their differing cost structures. The GREAT Proposal recognizes that the entire industry can benefit from the establishment of benchmark access rates that are deemed reasonable by the Commission, and that the access charge rates of ILECs and CLECs are not readily comparable, primarily because ILECs and CLECs do not necessarily employ the same rate structures or network architectures.

For example, the GREAT Proposal takes into account the fact that most CLECs do not assess PICC and other flat-rate charges that price cap ILECs are required by the Commission's Rules to collect from the IXCs. Furthermore, CLECs often have higher access costs because of the substantial up-front investment in facilities and network infrastructure that is required to compete with the ILECs. These costs typically are spread over a lower traffic volume than that of an ILEC, since CLECs usually serve smaller geographic regions and fewer customers. Finally, while the ILECs have operated for decades under an effectively guaranteed rate of return with a captive ratepayer base, CLECs must compete for customers, and are capitalized by debt and equity markets. Under these circumstances, a difference in the access rates charged by CLECs and ILECs is not only reasonable, but necessary.

Furthermore, the Joint Commenters submit that establishment of benchmark tariffed rates for CLEC access will obviate the need to continue litigating the issue of the "reasonableness" of access rates. As the Commission is painfully aware, some IXCs are refusing to pay selected CLECs for terminating access services they have received because the tariffed rates for these services are alleged to be unreasonable. Indeed, AT&T and Sprint have publicly declared "war" on CLECs and have refused to pay lawfully tariffed access charges. Standard access rates approved by the Commission and contained in FCC tariffs would obviate the need for further litigation of this issue and would provide greater assurance to CLECs that they will get paid for services rendered.

To that end, the Joint Commenters support the GREAT Proposal's establishment of a "benchmark rate" of 2.5 cents for CLECs serving Tier 1 markets, with a glide path down by 0.2 cents each subsequent year. Under the ALTS approach, as long as the CLEC access rate is at or below the relevant benchmark, the rate would be presumed reasonable under Section 201 of the Act. Further, the Joint Commenters support utilization of the NECA tariffed rates as the benchmark rates in Tier III and Tier IV markets.

As many carriers noted in an earlier phase of this proceeding, there is precedent for use of "benchmark" rates, as called for by the GREAT Proposal. The Commission has a long history of using benchmark rates as a means of regulation.[2] The establishment and use of benchmark rates for CLEC access rates would provide assurance to IXCs that the rates they are being charged are appropriate, without unduly burdening the CLECs by imposition of a mandatory detariffing approach.

Mandatory detariffing of CLEC rates would tip even further the balance of negotiating power in favor of IXCs. Imposition of a mandatory detariffing regime would place CLECs at a severe competitive disadvantage by allowing ILECs to continue to enjoy the benefits of the filed-rate doctrine, while simultaneously forcing CLECs to negotiate access agreements with hundreds of IXCs across the country. Adoption of benchmark rates, in conjunction with maintenance of a permissive detariffing regime, as set forth by ALTS in the GREAT Proposal, would address the Commission's concerns regarding access rate levels and abuse of the "filed rate doctrine" while at the same time ensuring that carriers retain the ability to efficiently serve their customers. Accordingly, the Joint Commenters recommend that the Commission adopt the GREAT Proposal filed by ALTS in this proceeding.

III. THE COMMISSION SHOULD RENOUNCE, IN NO UNCERTAIN TERMS, IXCs USE OF SELF-HELP

The Joint Commenters submit that the Commission should, in addition to adopting the GREAT Proposal, take this opportunity to reaffirm, in the strongest possible terms, its policy that carriers may not use self-help to resolve rate disputes. Under applicable Commission precedent, carriers who wish to challenge tariffed rates as unreasonable may file a

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2 *See, e.g., International Settlement Rates*, 12 FCC Rcd 19,806 (1997), *aff'd sub. nom., Cable & Wireless et al. v. FCC*, No. 97-1612 (D.C. Cir., Jan. 12, 1999); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order, 8 FCC Rcd 5631, *recon.*, 9 FCC Rcd 1164, 1171-79 (1993).

Section 208 complaint with the Commission; they may *not*, however, withhold payments.[3] Yet, as ALTS details in its filing, at least two IXCs have refused to compensate some CLECs for switched access service at their presumptively lawful tariffed rates. To the extent that carriers such as AT&T and Sprint continue to engage in self-help, despite Commission orders and precedent to the contrary, it is time for the Commission to take stronger measures to enforce its requirements – *e.g.*, the imposition of forfeitures and other penalties. Such action would do more to assure the continued availability of CLEC access services priced at reasonable rates than any regulation of CLEC access charges.

3 *See, e.g., MCI Telecommunications Corp.*, 62 FCC 2d 703 (1976).

IV. CONCLUSION

As discussed herein, the Commission should adopt the GREAT Proposal, which establishes a "benchmark rate" standard for CLEC access rates and maintains a permissive detariffing regime. At the same time, the Commission should confirm that IXCs may not utilize self-help measures against CLECs as means of challenging access rates.

Respectfully Submitted,

e.spire Communications, Inc.

KMC Telecom, Inc.

Talk.com Holding Corp.

XO Communications, Inc.

By: Ross A Buntrock

Brad E. Mutschelknaus
Ross A. Buntrock
KELLEY DRYE & WARREN LLP
1200-19th Street N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

Dated: January 11, 2001

CERTIFICATE OF SERVICE

I, Ross Buntrock, hereby certify that copies of the foregoing Joint Comments of e.Spire Communications, Inc., KMC Telecom, Inc., Talk.com and XO Communications, Inc. were served on January 11, 2001 by messenger on the following persons.

Jeffrey H. Dygert
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

International Transcription Service
445 – 12th Street, SW
Room CY-B400
Washington, D.C. 20554

Ross A. Buntrock

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